YEGAPPAN v. DISTRICT COUNCIL CENTRAL, PROVINCE WELLESLEY

[O.C.J. (Hepworth J.) July 10, 1964]

[Penang — Originating Motion No. 6 of 1964]

Practice and Procedure — Certiorari — Ex parte application for leave for order to quash decision of respondent — Copy of decision sought to be quashed not exhibited — Whether order granting leave bad in law — Applicability of English R.S.C. and Practice Note — R.S.C. 1957 O.16 rr.11 and 12 — English R.S.C. 1883 O.59 r.3(1) & (2), 7 and 8(1).

Certiorari — Ex parte application for leave to quash decision of respondent — Copy of decision not exhibited.

On June 5, 1964 the applicant made an *ex parte* application for leave to apply for an order of *certiorari* to remove into the court and quash a decision of the respondent concerning the approval of certain site and building plans constituting a housing scheme at Province Wellesley. An order was made on the same day granting the application and the said order provided that service of the intended application should be effected on the respondent and the developers and that the building operations should be stayed. In pursuance of this the applicant filed a motion on June 12, 1964 accompanied by a statement of the applicant dated June 4, 1964 and further affidavit affirmed on June 11, 1964. The notice of motion together with the statement and the affidavit were duly served on the respondent and the developers.

On June 19, 1964 the respondent filed a notice of motion asking for an order that the order of court dated June 5, 1964 and all subsequent proceedings therein might be set aside for illegality or alternatively for irregularity on the following grounds: (i) the applicant failed to file as an exhibit to the affidavit supporting his application for leave, the decision of the respondent sought to be quashed as required under O. 59 r. 3(2) of the English R.S.C., (ii) the order that building operations on the site of the said lots be stayed was *ultra vires* the powers of the court under O. 59 r. 3(4) on the ground that "building operations" are not within the meaning of the words "proceedings in question" in the said rule and also on the ground that the said order affected the rights of the third parties and could not be made on an *ex parte* application, (iii) the order dated June 5, 1964 was obtained by a suppression of material facts and failure to disclose the relevant law and the applicant had failed to show *uberrima fides*.

It was also raised as preliminary points that the developers had no *locus standi* to support the respondent and that the order staying the building operations was not an order against the respondent and therefore could not be challenged by the respondent. The judge ruled that as the order complained of ordered that the applicant's motion should be served on the developers and as this was done they were entitled to be heard as provided by O. 59 r. 7 whether or not they had given notice and further that the said order was an order against the respondent.

Held: (1) on the plain meaning of the words of English O. 59 rr. 3(1) and (2) and 8(1) it is not essential for the copy of the order sought to be quashed to be exhibited to an affidavit prior to the *ex parte* application for leave to apply nor for such copy to be filed in court at that stage; applying rule 8(1) to the existing local conditions its effect is that a copy verified by affidavit must be lodged in court before hearing of the motion for the order of *certiorari;*

(2) as both in the present case and the *Newington Licensing Justices* (1) case what was permitted to be done could not be done without permission, and the decision to grant the permission was the subject of complaint, and in both cases the rights of third parties were affected, it could not be said that the order of June 5, 1964 was *ultra vires* nor that the application could not be made *ex parte;*

(3) there was no evidence that the applicant had failed to show *uberrima fides* by a suppression of material facts and failure to disclose the revelant law.

Case referred to:—

(1) *R.* v. *Newington (Licensing) JJ.* [1948] 1 K.B. 681.

MOTION.

N. Sharma (*R. K. Sharma* with him) for the applicant.

Lim Ewe Hock for the respondent.

Eusoffe Abdoolcader (*Tan Lye Huat* with him) for the developers.

Cur. Adv. Vult.

Hepworth J.: On the 4th June, 1964, the applicant filed a notice of motion for leave to apply for an order of *certiorari* to remove into this court and to quash the decision of the District Council Central, Province Wellesley, approving the site plan and building plans constituting a housing scheme on Lots Nos. 14 and 15, Mukim 8, Province Wellesley Central. At the same time the statement of the applicant and an affidavit of the applicant in support, affirmed on the 4th June, 1964, were also filed.

On the 5th June, 1964, the application was heard *ex parte* and an order was made granting the application and providing that service of the intended application should be effected on the said district council and the persons apparently concerned in the development of the said lots (hereinafter referred to as "the developers") and making the said district council the respondent. The order also contained a provision that building operations on the site of the said lots should be and were thereby stayed.

In pursuance of the leave granted on the 5th June, 1964, a motion was filed by the applicant on the 12th June, 1964, returnable on the 19th June, 1964. This was accompanied by a copy of the statement of the applicant already referred to and a further affidavit of the applicant affirmed on the 11th June, 1964. The notice of motion together with the statement and the affidavit were duly served on the respondent and the developers and on the 19th June, 1964, the hearing of the motion was adjourned to a date to be fixed by the Senior Assistant Registrar.

On the 19th June, 1964, a notice of motion was filed on behalf of the respondent asking *inter alia* for an order that the order of court dated the 5th June, 1964, made in the application for leave and all subsequent proceedings therein might be set aside *ex debitio justiciae* for illegality or in the alternative as irregular on the grounds that:—

(a) the applicant has failed to file as an exhibit to the affidavit supporting the said application for leave the decision of the respondent sought to be quashed as required under Order 59 rule 3(2) of the English Rules of the Supreme Court, 1883, and that such non-compliance with the said rule is an illegality or in the alternative, an irregularity;

(b) the order that building operations on the site of the said lots be thereby stayed is *ultra vires* the powers of the court under Order 59 rule 3(4) on the ground that "building operations" are not within the meaning of the words "proceedings in question" in the said rule and also on the ground that the said order affects the rights of third parties and cannot be made on an *ex parte* application. That therefore the said order is an illegality or in the alternative an irregularity;

(c) the said order dated the 5th June, 1964, was obtained by a suppression of material facts and failure to disclose the relevant law in particular and that the applicant has failed to show *uberrima fides*.

This motion is supported by an affidavit made by the chairman of the respondent council.

By notice dated the 26th June, 1964, two of the developers gave notice that they would attend on the hearing of the respondent's motion and argue in support of it. This notice was accompanied by a short affidavit affirmed by two of the developers in support.

On the 29th June, 1964, the applicant filed an affidavit in reply asking that the respondent's motion should be dismissed with costs.

It is with the respondent's motion of the 19th June, 1964, that we are now concerned.

Three preliminary points were raised which can I think be disposed of quite briefly.

The first was that the court granting leave to apply is not the appropriate court to set aside that order. Once the order has been perfected the court has no jurisdiction and the proper remedy is by way of appeal. Mr. N. Sharma was, however, prepared to concede that the court has jurisdiction to set aside its own decision which is a nullity.

The second was that the developers had no *locus standi* to support the respondent. Mr. N. Sharma argued that Order 59 rule 7 applied only to the applicant's motion and that the developers should have applied to intervene under Order 16 rule 12 when the court could have added them as parties under Order 16 rule 11. The order complained of ordered that the applicant's motion should be served on the developers, and this was done, and in my opinion whether or not they had given notice they were entitled to be heard as provided in Order 59 rule 7. This entitles them to be heard on the respondent's motion as well as on the applicant's motion.

And the third point was that the order staying the building operations was not an order against the respondent and therefore could not be challenged by the respondent. This I am unable to accept. As will appear later in this judgment this order is in my opinion an order against the respondent.

The respondent's ground (c) can be disposed of quite briefly by saying that there is no evidence that the applicant has failed to show *uberrima fides* by a suppression of material facts and of failure to disclose the relevant law. The respondent has at this stage made no attempt to deal with the merits of the applicant's case and answer his charge that the respondent has failed to comply with the provisions of the Municipal Ordinance and By-Laws made thereunder.

The principal ground of objection is ground (a). Order 59 rule 3 sub-rules (1) and (2) and rule 8 sub-rule (1) read as follows:—

"3.— (1) No application for an order of mandamus, prohibition or *certiorari* shall be made unless leave therefor has been granted in accordance with this rule.

(2) An application for such leave as aforesaid shall, be made *ex parte* to a divisional court of the Queen's Bench Division, except in vacation when it may be made to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. The court or judge may, in granting leave, impose such terms as to costs and as to giving security as it or he thinks fit.

8.— (1) In the case of an application for an order of certiorari to remove any proceedings for the purpose of their being quashed, the applicant shall not question the validity of any order, warrant, commitment, conviction, inquisition or record, unless before the hearing of the motion or summons he has lodged a copy thereof verified by affidavit in the Crown office and associates' department, or accounts for his failure to do so to the satisfaction of the court or judge hearing the motion or summons."

In the *Annual Practice*, 1963, at page 1729 a footnote to Order 59 rule 3(2) states that the order which it is sought to have quashed must be in writing (*R.* v. *Newington* (*Licensing Justices* [1]) and exhibited to the affidavit, which must be filed before the *ex parte* application is made. The authority for this last requirement is stated to be *Practice Note* (1948) 92 Sol.J. 324.

For the applicant it was submitted that the decision of the respondent sought to be quashed was exhibited to the applicant's affidavit supporting his application for leave but that in any event it was not necessary at that stage either to exhibit a copy of the decision to such affidavit or to have filed a copy in court.

It is necessary to consider therefore firstly whether the exhibits to the applicant's affidavit of the 4th June, 1964, do include a copy of the decision of the council sought to be quashed and secondly if they do not whether at that stage such an exhibit is necessary and/or whether it is necessary to have filed a copy in court.

Exhibited to the affidavit of the applicant of

the 29th June, 1964, as Exhibits MPLY-1 and MPLY-2 are firstly the minutes of the special meeting of the housing committee of the respondent council held on Monday, the 9th December, 1963, at 2.30 p.m. and secondly the minutes of special meeting of the respondent council held on the same day at 3.03 p.m., in the council meeting room, Bukit Mertajam. The minutes of the meeting of the housing committee are headed:—

"Proposals for 5 two-storey shophouses, 7 one-storey terrace houses and 6 semi-detached one-storey houses on Lots 14 and 15, Mukim 8, Sungei Rambai."

The minutes of the meeting of the respondent council are headed:—

"Proposal for the construction of 5 two-storey shophouses, 7 one-storey terrace houses, and 6 semi-detached two-storey houses on Lots 14 and 15, Mukim 8, Sungei Rambai."

The operative part of the minutes of the housing committee meeting reads as follows:—

"The committee....decided to approve the plans of the sites and buildings as signed by the senior executive engineer and senior health officer in accordance with Building By-Law 20(i)."

The operative part of the minutes of the respondent council meeting reads as follows:—

"....the council decided to approve the plans for the sites and buildings.

.....

The chairman then proposed that the decision of the special meeting of the housing committee held on the 9th December, 1963, and the decision of the meeting of the committee in council should be approved.

The proposal was seconded by Inche Tan Cheng Bee and was agreed unanimously."

It seems to me that the decision of the respondent council which it is sought to have quashed is contained in those two extracts from the minutes of those meetings of the housing committee of the respondent council and of the respondent council respectively together with the plans of the sites and buildings referred to. I understand that there are in fact two plans, one known as the site plan and the other known as the building plan.

Exhibited to the affidavit of the applicant of the 4th June, 1964, in support of his application for leave as Exhibits A.1 and A.2 are firstly a letter from the secretary to the respondent council dated the 10th December, 1963, informing the applicant of the respondent council's approval of the site and building plans referred to above and secondly a photostat copy of a plan which is referred to as a lay-out plan of the proposed housing scheme. It is the applicant's contention that this letter from the secretary to the respondent council together with the photostat copy of the plan is the decision. In my opinion this is not so. This letter and this plan are not the record of the decision but are merely documents informing the applicant what the decision is. In my opinion as I have already said the decision is recorded in the extracts from the minutes referred to above together with the plans referred to therein and these constitute the order in writing which it is sought to have quashed.

Was at that stage such an exhibit necessary and/or was it necessary to have filed a copy in court? The respondent submits that the *Newington Licensing Justices* case is authority for their contention that the order to be quashed must be exhibited to the affidavit which must be filed before the *ex parte* application for leave is made. In particular they refer to the words of Humphreys J. at page 685 which reads as follows:—

"In the course of the argument in support of the application it appeared that the applicant in moving for leave had not complied with R.S.C. O. 59, r. 8, sub-r. 1 in that she had failed to lodge in the Crown office a copy of the order complained of. The attention of the court should have been drawn to that omission, and if it had been no leave would have been granted."

It is argued on behalf of the applicant that the *Newington Licensing Justices* case is not authority for saying that the order sought to be quashed must be exhibited to the affidavit filed in support of the *ex parte* application for leave, that such requirement is only a requirement of *Practice Note* (1948), 92 Sol.J. 324 and that Practice Notes in England are not binding on this court.

It is argued by Mr. Abdoolcader on behalf of all the developers that the reference in sub-rule (1) of rule 8 to an application for an order of *certiorari* is a reference to all the steps which culminate in the application including the application for leave.

I find it a little difficult to equate the words of the learned judge with the wording of the rule. From a perusal of the report it is clear that when the case for the justices was opened it appeared that the justices had made no written order and consequently no copy thereof had been lodged on the application for the order of *certiorari* as required by Order 59 rule 8(1). The justices were the respondents to the motion and it follows that this is a report of the hearing of the substantive motion for an order of *certiorari* and not the *ex parte* application for leave and that no copy had been lodged in that case either at the time of the *ex parte* application for leave or at the time of the hearing of the substantive motion.

Sub-rule (1) of rule 3 says "no application for an order of....*certiorari* shall be made unless leave therefor has been granted....". Sub-rule (2) of rule 3 says "an application for such leave as aforesaid shall be made *ex parte*....". But sub-rule (1) of rule 8 makes no reference to leave, saying "in the case of an application for an order of *certiorari*....". As sub-rule (1) of

rule 8 refers to an application for an order of *certiorari* and as sub-rule (1) of rule 3 says no application for an order of *certiorari* shall be made without leave, it follows that the application referred to in sub-rule (1) of rule 8 is the substantive motion for an order of *certiorari* made after leave has been granted. In my opinion therefore sub-rule (1) of rule 8 does not apply to an application for leave made *ex parte* under sub-rule (2) of rule 3.

I am reinforced in the view I take by a number of other points. If it had been intended that sub-rule (1) of rule 8 was to mean that the copy verified by affidavit was to be lodged prior to the application for leave, why did it not say so? That would *ipso facto* achieve the result of the copy verified by affidavit being lodged prior to the hearing of the substantive motion. In the footnote to sub-rule (2) of rule 3 the words "and exhibited to the affidavit, which must be filed before the *ex parte* application is made" appear after the reference to the *Newington Licensing Justices* case and before the reference to *Practice Note* (1948), 92 Sol.J. 324, thus making it clear that the authors of the *Annual Practice* at least do not consider that that case is authority for it but that the *Practice Note* is. Then again if sub-rule (1) of rule 8 means what is contended by the respondent what is the necessity for a Practice Note?

In the *Newington Licensing Justices* case had it been required to exhibit to the affidavit in support of the application for leave a copy of the order sought to be quashed it would have been apparent at the outset that there was no written order and leave would not have been granted. It seems to me to be likely that the *Practice Note* referred to was made so as to obviate such a state of affairs arising again. I think, however, that in this case in this country we are concerned with the wording of the rules in Order 59 and that we are not concerned with the Practice Note. I am unable to find any authority to say that such a Practice Note has any force here and in my opinion such a Practice Note is not binding on this court.

It is my opinion therefore on the plain meaning of the words of Order 59 rules 3(1) and (2) and 8(1) that it is not essential for a copy of the order sought to be quashed to be exhibited to an affidavit prior to the *ex parte* application for leave to apply nor for such a copy to be filed in court at that stage. There is, of course, no Crown office and associates' department in the courts in this country but applying the rule to existing local conditions its effect is in my opinion that a copy verified by affidavit must be lodged in court before the hearing of the motion for the order of *certiorari*.

It may be desirable for a copy of the order sought to be quashed to be exhibited to the affidavit in support of the application for leave to avoid a state of affairs such as arose in the *Newington Licensing Justices* case. But provided the court is satisfied on the hearing of the application for leave that there is in existence an identifiable order in writing and that on facts stated that order is *prima facie* an order that should be quashed then the court can grant leave to apply for an order of *certiorari*. In the present case there has never been any real doubt in anybody's mind what the order is the applicant is complaining of nor what his grounds of complaint are. Nor is there any doubt that on the face of the facts disclosed in the applicant's affidavit a number of breaches of the Municipal Ordinance and the By-Laws made thereunder have occurred. Of course the respondent may well have a good answer to all the applicant's allegations but we have not yet reached that stage.

This brings us to ground (b). The respondent pleads that "building operations" are not within the meaning of the words "proceedings in question" and complains that as the order affects the rights of third parties it cannot be made on an *ex parte* application. It is argued on behalf of the respondent and the developers that the word "proceedings" in Order 59 rule 3(4) refers to the proceedings impugned, that is to say the decision of the respondent. I am not altogether clear what the respondent means but I think the contention is that as the decision has been made there are no proceedings to stay. It was submitted that an example of where an order for a stay of proceedings would be appropriate would be where a licence had been granted to operate a public house, the stay presumably being to prevent the premises concerned from being used as a public house until the determination of the application for the order of *certiorari*. It was submitted that in the present case the appropriate action to be taken by the applicant was to obtain an interim injunction against the developers on the usual undertaking as to damages.

It is argued on behalf of the applicant that the decision complained of is the decision to pass the building plans and the passing of the building plans means bringing into effect the provisions of those plans, that is to say permitting the doing of acts in accordance with those plans. It is contended that these are the proceedings in question and that the respondent should be prevented from permitting the doing of facts in accordance with these plans until the determination of the application.

I am bound to confess that I find it very difficult to differentiate between an order of justices which permits a third party to use premises for pouring out a bottle of beer for sale to

the public and an order of a Council which permits a third party to use a piece of land for putting one brick on another also, presumably, for sale to the public. In both cases what is permitted to be done cannot be done without permission. In both cases it is the decision to grant that permission that is the subject of complaint. In both cases the rights of third parties are affected.

I think perhaps the relevant paragraph of the order in the present case might have been more happily worded. It might have been more appropriate to order a stay of "the use of the said site plan and building plans", but the practical result would have been exactly the same. The answer is in my opinion, as Mr. N. Sharma submitted, an early hearing of the motion, which is the entire purpose of Order 59.

The motion is dismissed with costs.

Motion dismissed.

Solicitors: *Sharma & Co.*; *Lim Ewe Hock & Tan Lye Huat & Co.*

SANDISON v. MALAYAN TIMES LTD. & ORS.

[O.C.J. (Ong J.) July 27, 1964]

[K.L. — Civil Suit No. 3 of 1963]

Libel and Slander — Newspaper report stating plaintiff dismissed from employment for corruption — Plaintiff alleging injury to credit and reputation by public scandal, odium, and contempt — Defence that publication was bona fide — Justification — Delay in offer of amends — Whether reasonable care taken by publishers — Defamation Ordinance, 1957, s. 7.

Damages — Libel — Conduct of plaintiff to be taken into account — Whether any residue of credit left to be damaged — Nominal damages.

The plaintiff, a 52 year old rubber planter of over 25 years standing, was the only senior expatriate officer in the Rubber Industry (Replanting) Board, being its General Manager since 1959. He was given notice of summary dismissal on October 26, 1962 and was required forthwith to hand over his duties to another officer of the board not later than October 31, 1962. On November 13, 1962 the defendant's newspaper published an article with big headlines entitled "RRB Expatriate 'Packed Off' for Corruption". The article stated that the services of a senior expatriate officer were terminated on November 1, 1962 and his duties were taken over by a senior local officer. It also contained the record of an interview by the defendants' reporter with the Director of the Anti-Corruption Agency in which the latter commented about the difficulties of obtaining a conviction in corruption cases.

The plaintiff claimed that the defendants meant and were understood by the readers to mean that the plaintiff was the person referred to in the report and that he had thereby been greatly injured in his credit and reputation and in his career as a rubber planter and had been brought to public scandal, odium and contempt. The plaintiff therefore claimed damages for libel. The defendants admitted the publication but denied everything else. They contended that the publication was made *bona fide* without malice or negligence and innocently and that they made an offer of amends by letters dated January 3, 1963 and January 24, 1963 which offers had not been withdrawn. Finally the defendants relied on justification and claimed that the words complained of were true in substance and in fact.

Held: (1) the headlines and the article following were defamatory in their ordinary and natural meaning and the plaintiff was clearly pin-pointed in the article so as to be instantly recognisable by all those readers of the newspaper who happened to know him;

(2) in the context of the headlines and the article (read together) the reference to obtaining a conviction in court made it clear beyond any equivocation that the word "corruption" bore the meaning it has in the title of the Prevention of Corruption Act;

(3) the defendants failed to justify that the plaintiff was corrupt in the sense made in the headlines and article;

(4) the offer of amends was not made as soon as practicable after the defendants received notice that the publication was or might be defamatory of the plaintiff because a whole month elapsed between the date of the plaintiff's notice and the defendants' reply;

(5) it was no defence for the publishers to say that the publication was not intended to be published of and concerning the plaintiff and that they had exercised all reasonable care in relation to it;

(6) the plaintiff's conduct as servant of the board was such as to have forfeited whatever esteem in which he was held by others before his dismissal. His summary dismissal by the board had left him little residue of credit and reputation to be further damaged by the libel in the defendants' newspaper. Accordingly the plaintiff would have one cent damages and costs.

Cases referred to:—

(1) *Dering* v. *Uris & Ors.* [1964] 2 W.L.R. 1298; [1964] 2 All E.R. 660.

(2) *Hilos* v. *Davies & Anor.* (1964) *The Times* June 20.

CIVIL SUIT.

A. L. Hills for the plaintiff.

K. C. Chia (*K. A. Menon* with him) for the defendants.

R. H. V. Rintoul held a watching brief for the Rubber Industry (Replanting) Board.

Cur. Adv. Vult.

Ong J.: The plaintiff is claiming damages for libel in respect of an article published by the defendants in their newspaper, *The Malayan Times.*

The plaintiff, now 52 years old, was a rubber planter of over 25 years' standing. His last appointment was from 1959 as General Manager of the properties of the Rubber Industry (Replanting) Board. On October 26, 1962, he was given notice of summary dismissal by his employers, requiring him forthwith to hand over his duties to another officer of the Board and to vacate the residence provided by the Board not later than October 31, 1962. On November 13, 1962, the defendant's newspaper published an article with big headlines "RRB EXPATRIATE 'PACKED OFF' FOR CORRUPTION". The statement of claim alleges a libel in the headlines